

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PLAZA BANK, a California Corp.,

Plaintiff,

v.

ALAN GREEN FAMILY TRUST, a Nevada
trust; ALAN GREEN an individual,

Defendants.

2:11-cv-130-RCJ-RJJ

ORDER

Currently before the Court are Defendants' Motion to Dismiss Complaint and/or in the Alternative Motion for Summary Judgment (#6) and Plaintiff's Countermotion for Partial Summary Judgment (#13). The Court heard oral argument on July 15, 2011.

BACKGROUND

In January 2011, Plaintiff Plaza Bank ("Plaintiff" or the "Bank"), an assignee of SouthwestUSA Bank filed a complaint against Defendants Alan Green Family Trust ("Green Trust" or "Trust") and Alan Green ("Green") (collectively "Defendants") and alleged the following. (Compl. (#1) at 1). The Federal Deposit Insurance Corporation ("FDIC") assigned SouthwestUSA Bank's loan documents to Plaintiff, a California banking corporation. (*Id.* at 2). The Green Trust executed a Credit Agreement and Disclosure with SouthwestUSA whereby SouthwestUSA agreed to loan the Green Trust \$400,000. (*Id.*). As security for repayment of the Credit Agreement, the Green Trust executed a Revolving Credit Deed of Trust, Security Agreement and Assignment of Rent ("Deed of Trust") with SouthwestUSA, whereby the Green Trust irrevocably granted all of its rights, title, and interest in real property located at 1900 S. 16th Street, Las Vegas, Nevada (the "Vegas Property"). (*Id.* at 2-3). The

1 Vegas Property declined in value and no longer adequately secured repayment of the amount
2 owed on the Credit Agreement. (*Id.* at 3). On December 25, 2010, the Green Trust defaulted
3 on the Credit Agreement and Deed of Trust (collectively “Loan Agreement”) by failing to make
4 the payments due and owing. (*Id.*). The Green Trust owed the Bank an excess of
5 \$398,126.77. (*Id.*). On December 3, 2010, the Green Trust transferred real property
6 described as 2122 Golf Links Drive, Prescott, Arizona, and 2201 Resort Way, Prescott,
7 Arizona, from the Green Trust to Green without any reasonable equivalent value to the Green
8 Trust, or any value whatsoever. (*Id.*). On December 16, 2010, the Green Trust transferred
9 real property described as 1608 Coyote Road, Prescott, Arizona, from the Green Trust to a
10 Linda Smith in which all consideration and proceeds were transferred from the Green Trust
11 to Green without any reasonably equivalent value or value whatsoever to the Green Trust.
12 (*Id.*).

13 The complaint alleged three causes of action. In the first cause of action, Plaintiff
14 sought declaratory relief that it was entitled to pursue claims for fraudulent transfer, pursuant
15 to NRS §§ 112.180, 112.190, against Defendants without violating Nevada’s one-action rule,
16 NRS § 40.430. (*Id.* at 3-4). In the second cause of action, Plaintiff alleged that the Green
17 Trust had made fraudulent transfers of property in violation of NRS § 112.180. (*Id.* at 4). In
18 the third cause of action, the Plaintiff alleged that the Green Trust made fraudulent transfers
19 of property in violation of NRS § 112.190. (*Id.*).

20 LEGAL STANDARD

21 Pursuant to Federal Rule of Civil Procedure 12, “[i]f, on a motion under Rule 12(b)(6)
22 or 12(c), matters outside the pleadings are presented to and not excluded by the court, the
23 motion must be treated as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d).

24 In reviewing a motion for summary judgment, the court construes the evidence in the
25 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
26 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment “if the movant shows
27 that there is no genuine dispute as to any material fact and the movant is entitled to judgment
28 as a matter of law.” Fed.R.Civ.P. 56(a). Material facts are “facts that might affect the outcome

1 of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106
 2 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is “genuine” if the evidence is such
 3 that a reasonable jury could return a verdict for the nonmoving party. *Id.*

4 The moving party bears the initial burden of identifying the portions of the pleadings and
 5 evidence that the party believes to demonstrate the absence of any genuine issue of material
 6 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265
 7 (1986). A party asserting that a fact cannot be or is genuinely disputed must support the
 8 assertion by “citing to particular parts of materials in the record, including depositions,
 9 documents, electronically stored information, affidavits or declarations, stipulations (including
 10 those made for purposes of the motion only), admissions, interrogatory answers, or other
 11 materials” or “showing that the materials cited do not establish the absence or presence of a
 12 genuine dispute, or that an adverse party cannot produce admissible evidence to support the
 13 fact.” Fed. R. Civ. P. 56(c)(1)(A)-(B). Once the moving party has properly supported the
 14 motion, the burden shifts to the nonmoving party to come forward with specific facts showing
 15 that a genuine issue for trial exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
 16 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). “The mere existence of a
 17 scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be
 18 evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252,
 19 106 S.Ct. at 2512. The nonmoving party cannot defeat a motion for summary judgment “by
 20 relying solely on conclusory allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d
 21 1040, 1045 (9th Cir. 1989). “Where the record taken as a whole could not lead a rational trier
 22 of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita*, 475
 23 U.S. at 587, 106 S.Ct. at 1356.

24 DISCUSSION

25 I. Defendants’ Motion to Dismiss Complaint and/or in the Alternative Motion for 26 Summary Judgment (#6)

27 Defendants argue that because it submitted matters outside the pleadings in support
 28 of this motion, the Court should consider the motion as one for summary judgment.

1 (Alternative Mot. for Summ. J. (#6) at 2). Defendants argue that, pursuant to the Loan
2 Agreement, Plaintiff may only foreclose on the underlying collateral and may not foreclose on
3 any other trust property. (*Id.* at 5). They assert that the trust itself never had any regular
4 income producing assets and that, when the trust was no longer able to make loan payments,
5 Green as Trustee, notified Plaintiff. (*Id.*). They contend that Plaintiff has no recourse against
6 Green because he did not sign a personal guarantee to the loan agreement. (*Id.* at 6). They
7 assert that Plaintiff's only recourse is to foreclose on the Vegas Property and take the
8 proceeds in satisfaction of the Loan Agreement. (*Id.*). They argue that the trust has no other
9 assets and that Plaintiff has no existing right to go after the other assets of Green individually
10 or those assets that were in the trust. (*Id.*). They also assert that, under Nevada law, Green
11 as Trustee, could move property in and out of the trust at any time and for any reason. (*Id.*).
12 They note that Green never moved the Vegas Property out of the trust. (*Id.* at 7). They assert
13 that the Loan Agreement did not require the Trust to maintain any additional collateral in the
14 Trust beyond the Vegas Property. (*Id.* at 6).

15 In support of the motion for summary judgment, Defendants attach Green's Affidavit,
16 the Green Trust documents, the Credit Agreement, and the Deed of Trust. (See Exhibits (#6,
17 7, 8, 9)). Green's affidavit stated the following. (Green Aff. (#6-1) at 1). Green created the
18 Green Trust, a revocable trust, in February 2005, and named himself the Trustee. (*Id.*). He
19 made the Vegas Property a trust asset. (*Id.*). The attorney who created the trust advised
20 Green that Green had "the power to manage and control the Trust assets, which included the
21 legal ability to sell, convey, exchange or otherwise dispose of any Trust property at any time."
22 (*Id.*). The Trust never had any regular income producing assets. (*Id.* at 2). When the Trust
23 was "no longer able to continue making loan payments, [Green] notified Plaintiff . . . of these
24 events and of [his] intent to relinquish any control of the [Vegas Property] to the Bank for
25 foreclosure proceedings or to execute a deed in lieu of foreclosure to the Bank." (*Id.*). In
26 2010, he transferred three properties out of the Trust. (*Id.*). Some of those properties were
27 encumbered with debt and personal guarantees against Green individually. (*Id.* at 2-3). He
28 did not move or dispose of the Vegas Property because of its status as the designated

1 collateral for the Loan Agreement with Plaintiff. (*Id.* at 3). He had no objections to the
2 foreclosure of the Vegas Property to satisfy the loan obligation. (*Id.*).

3 The Credit Agreement, dated January 25, 2006, stated that the Green Trust was the
4 borrower and that SouthwestUSA was the lender. (Credit Agreement (#7-1) at 1). The credit
5 amount was for \$400,000. (*Id.*). The agreement stated that "Borrower acknowledges this
6 Agreement is secured by the following collateral described in the security instrument listed
7 herein: a Revolving Credit Deed of Trust dated January 25, 2006, to a trustee in favor of
8 [SouthwestUSA] on real property located in Clark County, State of Nevada." (*Id.* at 2). Under
9 the provision entitled "Lender's Rights," the Bank could terminate the credit line account and
10 require Borrower to pay the entire outstanding balance in one payment if (1) Borrower
11 committed fraud or made a material misrepresentation at any time with the Credit Agreement,
12 including a false statement about Borrower's income, assets, liabilities, or any other aspect of
13 Borrower's financial condition, or (2) Borrower did not meet the repayment terms of the Credit
14 Agreement. (*Id.* at 3; Credit Agreement (#7-2) at 2).

15 The Deed of Trust stated the following. (Deed of Trust (#8-1)). The Vegas Property
16 secured the indebtedness of the revolving line of credit. (*Id.* at 2). It was the intention of
17 grantor (Green as trustee of the Green Trust) and the lender that the deed of trust secure "the
18 balance outstanding under the Credit Agreement from time to time from zero up to the Credit
19 Limit as provided in the Credit Agreement and any intermediate balance." (*Id.* at 1-2). The
20 deed of trust was given to secure payment of the indebtedness including future advances and
21 performance of each of grantor's agreements and obligations under the Credit Agreement.
22 (*Id.* at 2). In the event of a default, the lender could, *inter alia*, accelerate indebtedness,
23 foreclose on the Vegas Property, and/or invoke any other right or remedy provided by law.
24 (Deed of Trust (#8-2) at 4-5).

25 The Green Trust documents stated the following. (Trust Agreement (#9-1) at 1). In
26 February 2005, Green as trustor and as trustee established the Green Trust. (*Id.*). The Green
27 Trust listed the Vegas Property as the only trust asset. (*Id.* at 6). The trustee had the power
28 to borrow money and encumber the trust property by deed of trust. (Trust Agreement (#9-3)

1 at 2). The trustee had the power to retain, invest, reinvest in the trust estate every kind of
2 property. (*Id.*).

3 In response, Plaintiff filed an opposition to the motion to dismiss and countermotion for
4 partial summary judgment in the same pleading, but also docketed the countermotion for
5 partial summary judgment in a separate entry. (*Compare* Opp'n Mot. to Dismiss (#12), *with*
6 Countermotion (#13)). Plaintiff's opposition does not respond to the arguments raised by
7 Defendants and instead Plaintiff tries to move for summary judgment on other grounds. (*See*
8 *generally* Opp'n Mot. to Dismiss (#12)).

9 In reply, Defendants argue that because Plaintiffs have failed to respond to their motion
10 for summary judgment, this Court should grant their motion based on Local Rule 7-2(d).
11 (Reply to Alternative Mot. (#14) at 3).

12 Although Plaintiff's opposition to Defendants' motion for summary judgment is non-
13 responsive, the Ninth Circuit has held that "a nonmoving party's failure to comply with local
14 rules does not excuse the moving party's affirmative duty under Rule 56 to demonstrate its
15 entitlement to judgment as a matter of law." *Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th
16 Cir. 2003). The Ninth Circuit has noted that, in light of Rule 56's standards, it is highly
17 questionable that "a local rule can mandate the granting of summary judgment for the movant
18 based on a failure to file opposing papers where the movant's papers are themselves
19 insufficient to support a motion for summary judgment or on their face reveal a genuine issue
20 of material fact." *Henry v. Gill Indust., Inc.*, 983 F.2d 943, 949 (9th Cir. 1993).

21 In Nevada, "there may be but one action for the recovery of any debt, or for the
22 enforcement of any right secured by a mortgage or other lien upon real estate." Nev. Rev.
23 Stat. § 40.430(1). "In that action, the judgment must be rendered for the amount found due
24 the plaintiff, and the court, by its decree or judgment, may direct a sale of the encumbered
25 property, or such part thereof as is necessary" *Id.* Thus, in Nevada, "to recover a debt
26 secured by real property . . . , a creditor must seek to recover on the property through judicial
27 foreclosure before recovering from the debtor personally." *McDonald v. D.P. Alexander & Las*
28 *Vegas Blvd., LLC*, 123 P.3d 748, 750 (Nev. 2005). The purpose of the one-action rule is "to

1 prevent harassment of debtors by creditors attempting double recovery by seeking a full
2 money judgment against the debtor and by seeking to recover the real property securing the
3 debt.” *Id.* at 751. “Under the one-action rule, a debtor can require a creditor to foreclose on
4 real estate security before suing on the note or, if the creditor sues on the note first, force the
5 creditor to lose its security interest.” *Id.*¹

6 Within six-months of the foreclosure sale or trustee’s sale held pursuant to NRS
7 § 107.080, a judgment creditor may apply for and receive a deficiency judgment if there is a
8 deficiency of the proceeds of the sale and a balance remaining to due to the judgment creditor.
9 Nev. Rev. Stat. § 40.455(1). However, if the judgment creditor is a financial institution, the
10 court may not award a deficiency judgment even if there is a deficiency of the proceeds of the
11 sale and remaining balance due if:

- 12 (a) The real property is a single-family dwelling and the debtor or grantor was the
owner of the real property at the time of the foreclosure sale or trustee’s sale;
- 13 (b) The debtor or grantor used the amount for which the real property was
14 secured by the mortgage or deed of trust to purchase the real property;
- 15 (c) The debtor or grantor continuously occupied the real property as the debtor’s
or grantor’s principal residence after securing the mortgage or deed of trust; and
- 16 (d) The debtor or grantor did not refinance the mortgage or deed of trust after
17 securing it.

18 Nev. Rev. Stat. § 40.455(3)(a)-(d).

19 In this case, Defendants motion for summary judgment fails as a matter of law. As the
20 statutes demonstrate, Plaintiff, as a creditor, is entitled to seek a deficiency judgment against
21 the Green Trust, a debtor, after Plaintiff forecloses on the security interest. Therefore, after
22 foreclosing on the security interest, Plaintiff is entitled to seek satisfaction of the deficiency
23 from other trust assets. The evidence presented by Defendants do not prohibit Plaintiff from
24 seeking a deficiency judgment after it forecloses on the security interest. Moreover,
25 Defendants have not argued and have not provided any evidence that demonstrates that
26 Plaintiff is precluded from seeking a deficiency judgment based on NRS § 40.455(3)(a)-(d).

27
28 ¹ The exceptions will be discussed under the section analyzing Plaintiff’s
countermotion.

1 Therefore, the Court denies Defendants' motion for summary judgment (#6).

2 **II. Plaintiff's Countermotion for Partial Summary Judgment (#13)**

3 Although Plaintiff states that its motion is for "partial" summary judgment, Plaintiff seeks
4 summary judgment on all causes of action. (Countermotion (#13) at 1). Plaintiff argues that
5 the transfer of the three properties from the Green Trust are fraudulent transfers. (*Id.* at 8).
6 Plaintiff asserts that the Green Trust conveyed property with actual intent to hinder, delay, or
7 defraud it, in violation of NRS § 112.180, because two transfers were made to insider Green
8 as trustee, the transfers were not disclosed to the Bank, Green knew that upon the Green
9 Trust's default the Bank would have the right to litigate, the Vegas Property was the only asset
10 in the Trust after the transfers, the transfers were for consideration of ten dollars even though
11 Green had valued the properties at two million in 2009, and the Trust was insolvent on
12 December 3, 2010. (*Id.* at 9-10). Plaintiff asserts that on the same day that Green told
13 Plaintiff that the Trust had no assets, Green transferred two properties out of the Trust, and
14 then transferred the third property five days later. (*Id.* at 11). Plaintiff argues that the Green
15 Trust acted with actual fraud. (*Id.*). Plaintiff asserts that the Green Trust conveyed property
16 without receiving reasonably equivalent value in violation of NRS § 112.190. (*Id.*). Plaintiff
17 asserts that it has met its burden and that the Green Trust cannot establish that it was solvent
18 or that the transfers were for fair consideration. (*Id.* at 12). Plaintiff argues that, as a matter
19 of law, it is not violating the one-action rule because many states have found that fraudulent
20 conveyances are akin to a tort which exempts this action from the one-action rule. (*Id.* at 14).

21 In support of its motion for summary judgment, Plaintiff provides a declaration from Leo
22 Moschioni, Vice President of Plaza Bank, and supporting exhibits and a declaration from
23 attorney Nicole Lovelock and supporting exhibits. (See Ex. A (#13-1); Ex. B (#13-2)). On
24 December 3, 2010, Green's attorney sent Plaintiff a letter which stated the following:

25 Please be advised that I am counsel for Mr. Alan Green and in his capacity as
26 Trustee for the Alan Green Family Trust. . . . As you may be aware, Mr. Green
27 has had recent communications with your bank regarding the status of the loan
28 which originated between The Alan Green Family Trust and SouthwestUSA
Bank in 2006. I would note that, based on my review, the loan agreement exists
solely between the Trust and the bank, and there is no personal guarantee in
place for this loan.

1 Unfortunately, the Trust no longer has any income or assets to continue making
2 payments on the existing loan agreement, except for the security asset property
3 located at 1900 South 16th Street in Las Vegas [the Vegas Property]. Given
4 these events, the November, 2010, payment on the loan will be the final
5 payment made in this matter. The Trustee is willing to offer a deed in lieu of
6 foreclosure for the collateral property which secures the loan agreement to
7 compromise this manner in exchange for a full release and satisfaction in favor
8 of the Trust.

9 (Ex. A (#13-1) at 4; Ex. A-3 (#13-1) at 34).

10 According to a warranty deed recorded with Yavapai County, the Green Trust conveyed
11 to Green the property located at 2122 Golf Links Dr., Prescott, Arizona, for consideration of
12 ten dollars on December 3, 2010. (Ex. A (#13-1) at 4; Ex. A-4 (#13-1) at 36-37).² According
13 to the warranty deed recorded with Yavapai County, the Green Trust conveyed to Linda Smith
14 the property located at 1608 Coyote Road, Prescott, Arizona for consideration of ten dollars
15 on December 8, 2010. (Ex. A (#13-1) at 5; Ex. A-6 (#13-1) at 42, 45).

16 Plaintiffs include a document that purports to be an individual financial statement from
17 Green from April 2009, whereby Green states that the 2122 Golf Links Drive property had a
18 market value of \$900,000 with a mortgage balance of \$400,000; the 2201 Resort Way
19 property had a market value of \$800,000 with a mortgage balance of \$300,000; and the 1608
20 Coyote Road property had a market value of \$300,000 without a mortgage balance. (Ex. A
21 (#13-1) at 5; Ex. A-4 (#13-1) at 47).

22 On December 21, 2010, the Bank requested an appraisal of the Vegas Property which
23 valued the property at \$175,000. (Ex. A. (#13-1) at 5). On December 28, 2010, Plaintiff's
24 attorney received a letter from Defendants' attorney which stated:

25 the position of the Trust remains that there is no trust income to continue making
26 payments under the original line of credit agreement entered into in 2006
27 between the Trust and the original lender, Southwest Bank. I would note that
28 the existing credit agreement was secured solely by [the Vegas Property], when
the line of credit was established. The Bank did not request any additional
collateral, and no financial guarantee when the loan was initiated in 2006. The
Bank made the loan based off of the value of the home and its appraisal only,
as no other assets were pledged or collateralized to secure the loan. The

² Although Plaintiff purports to attach a copy of the warranty deed of the Green Trust's conveyance of the property at 2201 Resort Way, Prescott, Arizona, to Green for consideration of ten dollars on December 3, 2010, Exhibit 5 is the same warranty deed as Exhibit 4 for 2122 Golf Links Drive. (See Ex. A (#13-1) at 4-5; Ex. A-5 (#13-1) at 39-40).

1 existing contract did not require the Trust to pledge or secure any additional
2 Trust property for this loan agreement.

3 The Trust, itself has . . . never had any income during its existence [The
4 Vegas Property] is the only asset which secures the underlying indebtedness
5 with the Bank.

6 The Trust has had the property for sale over 18 months with no buyers in this
7 depressed real estate market. It was the intent of the Trust to sell the home and
8 repay the outstanding loan, however, market conditions have not allowed this
9 to occur.

10 (Ex. B (#13-2) at 2-3; Ex. B-1 (#13-2) at 6).

11 Plaintiff's attorney requested that Defendants' attorney provide a disposition of the
12 Green Trust's assets for the past two years but never received any documents. (Ex. B (#13-2)
13 at 3). Plaintiff's attorney provides a copy of correspondence to Defendants in this matter.
14 (*Id.*). On January 5, 2011, Plaintiff's attorney sent Defendants' attorney a letter which stated
15 that:

16 In response to your December 28th and January 4th correspondence, we
17 conclude that your client's refusal to disclose the disposition of assets for the
18 last two years means that material assets have been transferred from the Alan
19 Green Trust. As it appears the Trust has divested itself of substantial assets,
20 we are recommending that Plaza Bank reject the deed in lieu of foreclosure,
21 commence a non-judicial foreclosure, and seek a deficiency

22 (Ex. B-2 (#13-2) at 9-10).

23 In response, Defendants argue that the transfers did not make the Green Trust
24 insolvent because Green transferred out \$1,270,000 worth of debt from the Trust, "which
25 effectively removed debt obligations from the Trust, improving its position." (Opp'n to
26 Countermotion (#15) at 10). They reassert that, in Nevada, a trustee has the power to remove
27 assets from the Trust at anytime for any reason. (*Id.*).

28 In support of their argument, Defendants provide the declaration of Green and exhibits
for each transferred property. (See Green Aff. (#15-1) at 3). With respect to the property at
1608 Coyote, the exhibits state the following. Green purchased the property in July 2002 for
\$168,500. (Settlement Statement from July 2002 (#15-2) at 1). Green personally owned the
condo and had no mortgage or other indebtedness on the property when he transferred the
condo into the Trust in 2006. (Green Aff. (#15-1) at 3). The Trust did not compensate him for

1 the transfer. (*Id.*). On December 16, 2010, the Green Trust sold the property to Linda Smith
2 for \$215,000. (Settlement Statement from December 2010 (#15-3) at 1-2, 5). Upon the close
3 of escrow, the Green Trust received a check for \$204,461.87. (*Id.* at 1). The Trust then
4 transferred the sale proceeds to Green to reimburse him for his original investment in the
5 condo in 2002. (Green Aff. (#15-1) at 3).

6 With respect to the property at 2122 Golf Links Drive, the exhibits state the following.
7 In February 2007, Green purchased the property for approximately \$528,000. (Settlement
8 Statement dated February 2007 (#15-4) at 1). Wells Fargo loaned Green \$275,000 for the
9 first mortgage on the property. (Conditional Commitment Letter (#15-5) at 2). Wells Fargo
10 also issued Green a second revolving line of credit for \$200,000. (Account Statement (#16-1)
11 at 1). Green stated that he had purchased the property in the name of the Trust in 2007, but
12 the purchase was based on his own personal credit standing. (Green Aff. (#15-1) at 3). In
13 August 2010, Green refinanced his first mortgage with Wells Fargo for the same principal
14 amount of \$275,000. (Settlement Statement dated August 2010 (#16-2) at 1). Green stated
15 that, although he personally refinanced the loan with Wells Fargo in his name, the house
16 remained in the name of the Trust. (Green Aff. (#15-1) at 3-4). The house has a total debt
17 of \$475,000. (*Id.* at 4). Green is personally responsible for the debt despite the home being
18 purchased in the name of the Trust. (*Id.*). The home has no equity and does not have a value
19 of \$900,000. (*Id.*). In late 2010, Green transferred the property out of the name of the trust,
20 thus, removing an asset with no equity and \$475,000 worth of debt from the trust. (*Id.*).

21 With respect to the property at 2201 Resort Way, the exhibits state the following. In
22 May 2006, the Green Trust purchased the property for \$420,000 in cash. (Settlement
23 Statement May 2006 (#16-3) at 1). Green secured a line of credit with Wells Fargo for this
24 property for \$325,000. (Account Statement (#16-5) at 1). In late 2010, the Trust transferred
25 the property out of the Trust. (Green Aff. (#15-1) at 4).

26 In reply, Plaintiff argues that Green's affidavit demonstrates that Green will transfer a
27 property into the Green Trust free and clear but then pay himself back for the original purchase
28 and investment years later. (Reply to Countermotion (#17) at 5). Plaintiff argues that trusts

1 are separate and distinct legal entities and, thus, when the Green Trust transferred the
 2 properties to Green, he needed to provide an exchange of reasonably equivalent value. (*Id.*
 3 at 9).

4 **A. First Cause of Action: Declaratory Relief**

5 The Nevada Legislature enacted several exemptions to the one-action rule by clarifying
 6 the word “action.” *McDonald*, 123 P.3d at 751. The word “action” does not include any act
 7 or proceeding, inter alia, “[f]or the recovery of damages arising from the commission of a tort,
 8 . . . , or the recovery of any declaratory or equitable relief” or “[f]or the exercise of a power of
 9 sale pursuant to NRS 107.080.” Nev. Rev. Stat. § 40.430(6)(d)-(e). There are no Nevada
 10 cases that state whether an action for fraudulent conveyance is akin to a tort. However, other
 11 courts have recognized that a “majority of courts allow a tort plaintiff to challenge a tortfeasor’s
 12 allegedly fraudulent transfer of property in the same action as the tort suit.” *Rutherford v.*
 13 *Kessel*, 560 F.3d 874, 879 (8th Cir. 2009).

14 This Court finds that a claim for fraudulent conveyance is akin to a tort. Accordingly,
 15 the Court grants summary judgment on Plaintiff’s first cause of action for declaratory relief that
 16 pursuing a fraudulent conveyance claim does not violate Nevada’s one-action rule because
 17 a fraudulent conveyance claim is an exemption to the rule pursuant to NRS § 40.430(6)(d).
 18 However, as discussed at oral argument, the Court orders Plaintiff to amend its complaint
 19 within 60 days from the date of oral argument to state whether it is: (a) waiving the collateral
 20 and asking for judgment on the note, or (b) foreclosing on the Vegas Property and seeking a
 21 deficiency.

22 **B. Second Cause of Action: Actual Fraudulent Transfer NRS § 112.180**

23 The Uniform Fraudulent Transfer Act is “designed to prevent a debtor from defrauding
 24 creditors by placing the subject property beyond the creditors’ reach.” *Herup v. First Boston*
 25 *Fin., LLC*, 162 P.3d 870, 872 (Nev. 2007). Pursuant to NRS § 112.180 “[a] transfer made or
 26 obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose
 27 before or after the transfer was made or the obligation was incurred, if the debtor made the
 28 transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay or defraud any

1 creditor of the debtor.” Nev. Rev. Stat. § 112.180(1)(a). In determining actual intent, a court
 2 may consider a non-exclusive list of factors including: (a) the transfer or obligation was to an
 3 insider; (b) the debtor retained possession or control of the property transferred after the
 4 transfer; (c) the transfer or obligation was disclosed or concealed; (d) before the transfer was
 5 made or obligation was incurred, the debtor had been sued or threatened with suit; (e) the
 6 transfer was of substantially all the debtor’s assets; (f) the debtor absconded; (g) the debtor
 7 removed or concealed assets; (h) the value of the consideration received by the debtor was
 8 reasonably equivalent to the value of the asset transferred or the amount of the obligation
 9 incurred; (i) the debtor was insolvent or became insolvent shortly after the transfer was made
 10 or the obligation was incurred; (j) the transfer occurred shortly before or shortly after a
 11 substantial debt was incurred; and (k) the debtor transferred the essential assets of the
 12 business to a lienor who transferred the assets to an insider of the debtor. Nev. Rev. Stat. §
 13 112.180(2)(a)-(k).

14 “A debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s
 15 assets at a fair valuation.” Nev. Rev. Stat. § 112.160(1). “A debtor who is generally not paying
 16 his or her debts as they become due is presumed to be insolvent.” Nev. Rev. Stat. §
 17 112.160(2). An asset is property of the debtor but does not include property to the extent that
 18 it is encumbered by a valid lien. Nev. Rev. Stat. § 112.150(2)(a).

19 In this case, the Court acknowledges that there are facts in the record that demonstrate
 20 that the Green Trust may have had actual intent to hinder Plaintiff’s ability to recover from the
 21 Green Trust. However, the Court finds that there is a genuine issue of material fact as to
 22 whether the Green Trust had “actual intent” to hinder Plaintiff. Accordingly, the Court denies
 23 summary judgment on the second cause of action and preserves this claim for trial.

24 **C. Third Cause of Action: Constructive Fraudulent Transfer NRS § 112.190**

25 Pursuant to NRS § 112.190, a “transfer made . . . by a debtor is fraudulent as to a
 26 creditor whose claim arose before the transfer was made . . . if the debtor made the
 27 transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . .
 28 and the debtor was insolvent at that time or the debtor became insolvent as a result of the

1 transfer” Nev. Rev. Stat. § 112.190(1). “Generally, the creditor bears the burden of proof
2 both with respect to the insolvency of the debtor and the inadequacy of consideration.”
3 *Sportsco Enter. v. Morris*, 917 P.2d 934, 938 (Nev. 1996). “However, where the creditor
4 establishes the existence of certain indicia or badges of fraud, the burden shifts to the
5 defendant to come forward with rebuttal evidence that a transfer was not made to defraud the
6 creditor.” *Id.* “The defendant must show either that the debtor was solvent at the time of the
7 transfer and not rendered insolvent thereby or that the transfer was supported by fair
8 consideration.” *Id.* Recognized indicia of fraud include:

9 lack of consideration for the conveyance, the transfer of the debtor’s entire
10 estate, relationship between transferor and transferee, the pendency or threat
11 of litigation, secrecy or hurried transaction, insolvency or indebtedness of the
12 transferor, departure from the usual method of business, the retention by the
13 debtor of possession of the property, and the reservation of benefit to the
14 transferor.

15 *Id.*

16 In this case, there are a number of indicia of fraud. First, in two of the three transferred
17 properties the Trust received no consideration or minimal consideration for the conveyance.
18 Second, the Green Trust transferred those two properties to its trustee, Green. Third, the
19 Green Trust knew that it was about to face litigation after it told Plaintiff that it was no longer
20 going to make payments on the loan. Fourth, the transfers occurred on the same day or a
21 couple days after the Trust told Plaintiff that it had no income or assets and was not going to
22 make any more payments on the loan. Fourth, after the transfers, the Green Trust was
23 insolvent because the Vegas Property could not cover the repayment of the loan. Fifth, after
24 having the various properties in the Green Trust for several years, the Trust started to
25 immediately transfer the properties out of the Trust on the day it decided not to repay the loan.
26 Sixth, Green as a trustee and then later as an individual retained possession of the 2122 Golf
27 Links property, the 2201 Resort Way property, and the cash from the sale of the 1608 Coyote
28 property after the transfers.

Because Plaintiff has demonstrated indicia of fraud, Defendants have the burden to
demonstrate that the Green Trust was solvent at the time of the transfer and was not rendered

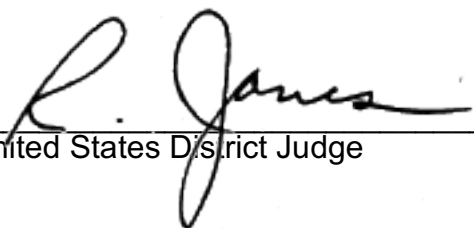
1 insolvent after the transfer and that the transfer was supported by fair consideration. The
2 Court finds that Defendants have failed to meet their burden with respect to the 1608 Coyote
3 property. After the Green Trust sold the 1608 Coyote property for \$215,000, the Green Trust
4 transferred all of the monetary proceeds to Green for nothing in return. As such, the Court
5 grants summary judgment on Plaintiff's third cause of action for constructive fraudulent
6 conveyance with respect to the cash sale of the 1608 Coyote property. However, the Court
7 denies, without prejudice, Plaintiff's motion for summary judgment with respect to constructive
8 fraudulent conveyance as to the 2122 Golf Links and 2201 Resort Way properties. As
9 discussed at oral argument, Defendants have 90 days from the date of oral argument to obtain
10 an appraisal of the two real properties in Green's possession. As stated at oral argument,
11 Plaintiff may conduct an independent appraisal of the two properties if it so chooses.

12 CONCLUSION

13 For the foregoing reasons, IT IS ORDERED that Defendants' Motion to Dismiss
14 Complaint and/or in the Alternative Motion for Summary Judgment (#6) is DENIED.

15 IT IS FURTHER ORDERED that Plaintiff's Countermotion for Partial Summary
16 Judgment (#13) is GRANTED in part and DENIED in part. Specifically, the Court grants
17 summary judgment on Plaintiff's first cause of action in its entirety and third cause of action
18 with respect to the cash sale of the 1608 Coyote property. The Court denies summary
19 judgment on Plaintiff's second cause of action in its entirety and third cause of action with
20 respect to the 2122 Golf Links and 2201 Resort Way properties.

21
22 DATED: This 26th day of July, 2011.

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25 
26 United States District Judge
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28